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FEDERAL INCORPORATION

THE POWER OF CONGRESS TO CHARTER INTERSTATE COMMERCE CORPORATIONS

THE main thesis of this article is that Congress has authority, first, to create commercial corporations to carry on an interstate and foreign business, to confer upon such corporations authority to manufacture articles to be passed into such commerce and to exempt all their operations and private-legal relations from any state control whatsoever; and, second, to license individuals as well as corporations for a like purpose and to confer upon them similar exemptions from state control.

This, however is, only a part of a wider power, *viz.* the power of Congress to create a system of interstate and foreign commerce and to license the production of articles to be passed into such commerce under exclusively federal control. This wider power includes also the power of excluding from such commerce all individuals or corporations not conforming to the conditions laid down by Congress, as well as all goods not produced in conformity to such conditions, it being understood, always, that these conditions must not violate constitutionally protected private rights. This power of exclusion is only incidentally referred to in the following pages, its consideration being reserved for a later discussion.

All discussion of the constitutionality of laws passed by Congress providing for the erection of corporations to carry on interstate or foreign commerce must start from the controversy which was waged with regard to the first and second United States banks, and which received its judicial determination in the case of *McCulloch v. Maryland*,¹ affirming the constitutionality of the second bank. Before considering this decision, however, it will be well to examine Hamilton's cabinet opinion,

¹ 4 Wheaton, 316.

which convinced Washington of the constitutionality of federal incorporation as applied to the first bank. The similarity of the views of Hamilton and Marshall, often extending to a very close agreement of language, reveals Marshall's indebtedness to Hamilton. This fact gives to Hamilton's argument an almost judicial authority, in addition to its intrinsic value as the best discussion of federal incorporation to be found in our political and juristic literature.¹

The essential basis of Hamilton's argument is to be found in the proposition—"inherent in the very *definition* of government"—"that every power vested in a government is in its nature *sovereign*."² From this fact it follows that "all the *means* requisite and fairly applicable to the attainment of the *ends* of such power" may be used in carrying it into effect, provided they are not precluded by express restrictions and exceptions found in the Constitution. Accordingly, there can be no "abstract" question as to the power of the United States to erect corporations. Such erections are an unquestionable incident of sovereign power.³ The only limitation upon the power is found in the fact that corporations chartered by the United States must bear a relation to the attainment of those objects over which the national government has authority. An illustration of an improper object for the erection of a federal corporation is the superintendence of the police of Philadelphia, since the national government has no control over that matter.⁴ Among the illustrations of proper objects are foreign and interstate commerce, because "it is the province of the Federal Government to *regulate* these objects, and because it is incident to a general *sovereign* or legislative power to *regulate* a thing, to employ all the means which relate to its regulation to the best and greatest advantage."

The power of erecting a corporation is necessarily implied in the power of regulating an object, since a corporation is but

¹ Cf. *Farmers National Bank v. Deering*, 91 U. S. 29. Here the court couples the reasoning of Hamilton with that of Marshall as affording justification for the principle of the National Bank Act of 1864.

² Hamilton's Works, Federal Edition, vol. iii, p. 446.

³ *Ibid.* p. 448.

⁴ *Ibid.* p. 450.

a “*quality, capacity or means* to an end,” and not “some *great, independent substantive thing*.”¹ Nor is there requisite any particular degree of necessity as a means to an end, but only a “relation between the nature of the means employed towards the execution of a power, and the object of that power.” Again, Hamilton formulates as a criterion of constitutionality the principle that “if the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority.”²

Finally Hamilton cites, as a clear illustration of the validity of federal incorporation, the supposed case of a company formed for the development of a new branch of foreign trade. Such an incorporation is a means in general use among foreign countries, and, Hamilton enquires, why may not the United States “*constitutionally* employ the *means*, usual in other countries, for attaining the *ends* entrusted to them?”³

On the broad basis of Hamilton’s argument rests Marshall’s opinion, in the case of *McCulloch v. Maryland*.⁴ The key to Marshall’s reasoning is to be found in the proposition that the general powers entrusted to the federal government, with their vital connection with the well-being of the nation, may be regarded as carrying with them ample means for their successful execution. He points out that “the power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.” Applied to the case before the court, this means that the erection of a corporation not being forbidden, such an erection is permissible whenever “essential to the beneficial exercise of those powers.” The words “necessary and proper” include “any means calculated to produce the end.”⁵ This meaning of “necessary” is enforced by the distinction between a constitution intended for

¹ *Ibid.* p. 451.

² *Ibid.* p. 458.

³ *Ibid.* p. 487.

⁴ 4 Wheaton, 316.

⁵ *Ibid.* p. 413.

permanence and adaptability to changing circumstances and a mere legal code.¹ A narrower meaning would deprive the legislature of discretion and the power to take advantage of experience and to fit its legislation to changing circumstances. After pointing out that the "necessary and proper" clause purports, from its location in the Constitution, to be a power granted and not a limitation upon congressional authority, Marshall concludes this part of the argument with these trenchant words:

But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.²

Marshall then shows that a corporation is an appropriate means for carrying out the powers entrusted to the federal government and that a banking corporation is an appropriate fiscal instrument. It should be noted here that Marshall, like Hamilton, does not regard the bank as a peculiar case standing upon any unusually strong ground, but holds rather that the power to charter corporations "may be employed indiscriminately with other means to carry into execution the powers of the government."³

The degree of utility or necessity is not a matter for judicial consideration. "Where the law is not prohibited and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground." It may accordingly be affirmed that, where the measures of Congress

¹ 4 Wheaton, 415.

² *Ibid.* p. 421.

³ *Ibid.* p. 422. It will be noted that there is here no suggestion of any superior sanctity attached to a corporation which has a "political" connection with the government.

have reasonable relation to the attainment of the legitimate objects of the federal government, their constitutionality will be recognized.

In the case of *Osborn v. The Bank of the United States*,¹ Marshall considers an argument which, he thinks, if representing the true facts regarding the nature of the bank, not only would justify taxation by the states of the operations of the bank, but would also show that the incorporation of the bank was unconstitutional. He accordingly once more examines the grounds upon which the constitutionality of the incorporation may be upheld. In this discussion some phrases appear which may easily give rise to the idea that these grounds are much more limited than we have found them to be in the above discussion of the *McCulloch* case, and that something in the nature of a distinctly "political" connection between the government of the United States and any corporation erected by it is essential. Careful consideration, however, will show any such idea to be unfounded, and will demonstrate the invalidity of all those arguments against any federal incorporation which are founded upon the "private" nature either of the motives actuating the company or of the operations which it carries on, provided that the purpose of the government is the facilitation of its control over, and the better regulation of, any matter entrusted to its care.

The position of appellant's counsel in this case, as stated by Marshall, was that "the right of a state to tax the bank is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and profit for its great and principal object."² It was alleged³ that "banking is, in its nature, a private trade . . . the whole is a private concern; the capital is private property; the business is a private and individual trade; the convenience and profit of private men the end and object." The bank was classed with "insurance, canal,

¹ 9 Wheaton, 738.

² *Ibid.* p. 859.

³ Argument of Mr. Hammond; *ibid.* pp. 766 *et seq.*

bridge and turnpike companies," in all of which cases the corporations were alleged to be private, although "the uses may, in a certain sense, be called public." The bank was carefully distinguished from the post office, the business of which "is of a public character" and the charge of which "is expressly conferred upon Congress by the Constitution." It was alleged that, although the subordinate agents of the post office are invested with the character of public officers, the contractors who carry the mails are not, and that the horses and carriages which they use for this purpose are liable to state taxation, since they are used for the private profit of the contractor. And the case of the bank is alleged to be even more clear, since the chief use of the horses and wagons is for public business, while the public business of the bank is subordinate and incidental.

The argument for a distinction (resting upon the basis of a company's motive as being primarily or exclusively the securing of private gain) between instrumentalities of the government (using "instrumentality" in a narrow sense) and private corporations is certainly here set forth with all possible cogency. Marshall indeed grants that the conclusion reached would result from the premises assumed, but he denies the validity of the premises. The bank is to be considered "as a public corporation, created for public and national purposes."

That the mere business of banking is, in its own nature, a private business and may be carried on by individuals or companies having no political connection with the government is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch v. The State of Maryland*, is founded upon and sustained by the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States."

Certain phrases in the above quotation might possibly appear, *prima facie*, to support the theory that federal incorporation must be very closely limited in scope. But more careful examination will show that such an interpretation would be erroneous.

Marshall's statement that the bank is not to be considered as a private corporation, with private gain as its principal object, means simply that the purpose of Congress in incorporating the bank was, not to aid the shareholders in securing a private profit, but rather to secure a useful means for providing for the national welfare in a matter entrusted to the care of Congress. The context, particularly the admission that banking is in its own nature a private business, demonstrates this. Furthermore, it would be absurd to understand Marshall to deny that the principal object of the shareholders was private gain. Nor can he mean, what was not true, that the principal business of the bank was directly governmental and its private business only incidental. The point of Marshall's contention is that the bank "was not created for its own sake . . . [but] is an instrument . . . for carrying into effect the powers vested in the government of the United States." Private gain is indisputably the motive of the stockholders, but the criterion of constitutionality is rather the purpose of Congress, and this is a public purpose.

A more plausible argument may be founded upon Marshall's use of the word "political." What is the true import of Marshall's distinction between banking as carried on by "individuals or companies having no political connection with the government" and banking as carried on by individuals or companies which do have a political connection? This distinction may have either of two meanings.

It may mean that the bank may be regarded as a quasi-governmental body, performing certain ordinary governmental functions which must otherwise be performed by the government itself. If this interpretation correctly represents Marshall's meaning, it does not at all follow that he means to imply that no federal incorporation is permissible where the corporation does not discharge this kind of political function. In this decision he is explaining further his opinion in *McCulloch v. Maryland*, and no such limitation is to be found in that opinion. The argument there is that federal incorporation may be used indiscriminately in the carrying into effect of the powers vested in the federal government. The power to incorporate is an in-

cident of sovereignty, no more limited in the case of the United States than in that of the states; and the states are, of course, not limited in their creation of corporations to those which are to perform quasi-governmental functions. If anything further were needed to show that, if Marshall is using the word "political" in this very narrow sense, he is not intending to indicate a limitation upon the general federal power of creating corporations but is merely giving the most striking particular justification of the bank, corroboration is found in his assertion that "it has never been supposed" that Congress could create such a corporation as a banking corporation having no "political" connection with the government. Considering the evident close dependence of Marshall's argument upon that of Hamilton and the celebrity of Hamilton's opinion, it is past all belief that Marshall could assert that anything which formed the very core of Hamilton's argument "has never been supposed."

It might accordingly be conceded that Marshall used the word "political" in this narrow sense without at all weakening the broad basis of his own and Hamilton's arguments. It would certainly seem, however, that he used the word in a much wider sense, covering the entire field of the relation of federal incorporation as a means to the accomplishment of ends within the purview of the federal government. Thus used, "political" would be synonymous with "public," connoting the existence of a public motive. Thus interpreted, Marshall's statement means simply that any incorporation must bear a real relation to the proper regulation of some matter entrusted to the care of the federal government. It is submitted that this interpretation of Marshall's use of the word "political" is in more obvious agreement with the context, which shows it to have been an elaboration of the doctrine of *McCulloch v. Maryland*. Furthermore, it is a natural signification of a word admittedly ambiguous and capable of diverse meanings.

Marshall remarks that the right of doing a private business is essential to the usefulness of the bank; that

if it be as competent to the purposes of the government without as with this faculty, there will be much difficulty in sustaining that essential

part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government and was constitutionally and rightfully engrafted on the institution.¹

This principle that whatever powers are essential, in order that a corporation may be completely fitted to serve the ends for which the government creates it, may be constitutionally conferred is of distinct applicability to the conferring of the power upon federal corporations, created to engage in interstate commerce, to manufacture the products which are to pass into such interstate commerce; since otherwise the ends which make the incorporation legitimate cannot be efficiently secured.

Marshall points out also that it is not the corporate character of the bank which exempts its operations from state control. The exemption arises because "the business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident which enables it to transact that business more beneficially."²

Any operations of a federal corporation or licensee which are essential to the fulfilment of the national purpose for the sake of which the charter or license is granted are exempt from state control. The question of such essentiality is primarily one for legislative determination.³ But Marshall's own criterion is simply the fact that any particular power conferred gives to the corporation a superior fitness as an instrument for the carrying into effect of national purposes. With regard to a particular argument of counsel, he points out that the acts of federal contractors in fulfilling their contracts are not within state control.

Considering the decision as a whole, it may be said that it does not at all limit the principles advanced in Hamilton's cabinet opinion and laid down judicially, in essentially the same breadth, by Marshall in *McCulloch v. Maryland*. In meeting the issue raised in *Osborn v. The Bank of the United States*, as to the effects of the motive of private gain as animating the company, it carries the argument explicitly another step in advance. Finally, in the discussion of the powers which may

¹ 9 Wheaton, 864.

² *Ibid.* p. 862.

³ *Ibid.* p. 864.

constitutionally be conferred in order to create a satisfactory instrumentality for the working out of proper national purposes, it affords solid ground upon which to rest the constitutionality of legislation conferring power to manufacture upon federally erected interstate-commerce corporations.

The constitutionality of the National Bank Act of 1864 was maintained by the court in the case of *Farmers National Bank v. Deering*.¹

Aside from the question of national banks, discussion of the power of Congress to charter corporations has been occasioned chiefly by the federal incorporation of, or the grant of franchises to, railroad companies, particularly in connection with the development of the system of Pacific railroads.

In the Pacific Removal case,² the court held that the Union Pacific Railroad Company was "strictly a corporation of the United States." It further held that, when powers granted by the federal government are inextricably blended with powers granted by the states, the control of Congress is determinative in regard to the whole matter. In the case of *California v. Central Pacific Railroad Company*,³ the court held not only that the company held federal franchises but also that the grant of such franchises was constitutional. It held, further, that the authority of Congress to grant such franchises does not rest solely upon its power over postal and military matters but also—and upon this ground the court laid most stress—upon the commercial power. The court said:

It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states . . . had authority to pass these laws. The power to construct or to authorize individuals or corporations to construct national highways or bridges from state to state is essential to the complete control and regulation of interstate commerce.

The court pointed out that under earlier economic conditions, when commerce by water was most important, many statesmen doubted the power to establish ways of communication by land.

¹ 91 U. S. 29.

² 115 U. S. 15, 16.

³ 127 U. S. 1.

But with the development of land commerce "a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject"—a power "very freely exercised, and much to the general satisfaction," in the creation of the Pacific railroad system.

If due consideration is given to the opinions of Hamilton and Marshall, it can hardly be doubted that, if Congress can grant franchises, it can create corporations, it being understood in either case that the end for which the power is exercised is one within the competence of Congress. It should also be noted that, both in the case just considered¹ and in the later case of the Central Pacific Railroad Company *v.* California,² it is explicitly recognized that a railroad company having federal franchises is an agent of the federal government. And, as the commerce power is cited as the chief authorization for such a grant, it is evident that the term "agent" may include a corporation erected for the sake of the facilitation and regulation of interstate commerce.³

Before summarizing and applying the conclusions thus far reached regarding the federal power of establishing corporations, it is well to allude briefly to the views of the Supreme Court as to the effect upon constitutional interpretation of changing industrial and commercial conditions. In the case of *In re Debs*,⁴ the court points out that the "basis upon which rests its [*i. e.* the federal government's] jurisdiction over artificial highways is the same as that which supports it over the natural highways," notwithstanding the fact that this jurisdiction had previously been exercised almost exclusively over the latter. The court says:

¹ *Ibid.* p. 40.

² 162 U. S. 91, at pp. 124, 125.

³ Federal incorporation has also been employed in the case of a bridge company. In the case of *Luxton v. North River Bridge Company* (153 U. S. 525) the incorporation of the company and the authorization of the construction by it of a bridge across the North River between New York and New Jersey was upheld as a valid exercise of the commercial power. The court states, as resting "upon principles of constitutional law, now established beyond dispute," the proposition that Congress may create a corporation "for the purpose of promoting commerce among the states."

⁴ 158 U. S. 564.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers and it will operate with equal force upon any new modes of such commerce which the future may develop.¹

The same principle is elaborated with perhaps even greater force and clarity by Justice Moody, in his dissenting opinion in the Employers Liability cases.² After discussing the development of commerce, he says:

The different kinds of commerce described (foreign, Indian, interstate) have the common qualities that they are more extensive than the jurisdiction of a single state and liable to injury from conflicting state laws and thereby are all distinguished from the purely internal commerce of the states It was not reasonably to be expected that a phenomenon so contrary to the experience of mankind, so vast, so rapidly developing and changing, as the growth of land commerce among the states, would speedily be appreciated in all its aspects, or would at once call forth the exercise of all the unused power vested in Congress by the commerce clause of the Constitution. Such a phenomenon demands study and experience. The habit of our people, accentuated by our system of representative government, is not so much in legislation to anticipate problems as it is to deal with them after experience has shown them to exist. So Congress has exercised its power sparingly, step by step, and has acted only when experience seemed to require action.³

This is the method of constitutional interpretation which alone can preserve the true meaning and intent of the Consti-

¹ 158 U. S. 564, at pp. 590 *et seq.*

² 207 U. S. 463, at pp. 519 *et seq.* It should be noted that in this portion of his opinion Justice Moody is not dissenting from the prevailing opinion.

³ *Ibid.* p. 523.

tution. If it be not followed, the bankruptcy of American constitutional interpretation, as its foundations were established by Chief Justice Marshall, will in effect have arrived, and the intent of the Constitution will have been sacrificed to a narrowness of vision which cannot be dignified even by calling it a worship of the letter of the Constitution.

It is evident that what has been said applies not only to the development of new forms of commerce but also to changes which affect the distinction between interstate and intrastate commerce. Under the conditions of 1911 many matters are properly interstate which in 1789 would have been purely or principally intrastate. This development must be taken into consideration, and all commerce which is, under existing conditions, "more extensive than the jurisdiction of a single state and liable to injury from conflicting state laws" must be recognized as properly under the jurisdiction of Congress.

On the basis of the conclusions thus far attained, it is proposed to examine, first, the constitutionality of the erection of federal corporations having the power to engage in interstate commerce. The constitutionality of granting to such corporations the power to manufacture will be discussed later.

In order to show the constitutionality of the erection of federal corporations having the power to carry on any sort of interstate commerce—the particular cases of water and land transportation having already been decided affirmatively—about all that seems necessary is the restatement of the principles deduced from the cases above examined regarding the federal power of incorporation, together with a brief statement of the conditions under which alone a really effective control of interstate commerce can be established.

Those principles may be recapitulated as follows: (1) A corporation is not an independent end but simply a means of attaining an end. (2) The creation of a corporation is not a great and unusual matter, requiring special justification, but is rather an ordinary incident of the exercise of sovereignty, sovereignty being used in the sense of supreme legislative power over a given matter. (3) The government of the United States,

having such sovereignty with regard to the matters entrusted to its care by the federal Constitution, may exercise with regard to such matters the power of erecting corporations. (4) The sole tests of the validity of such federal incorporations are that the congressional purpose must be the better exercise of power over such matters, that the acts of incorporation must have an actual relation thereto sufficiently close to indicate that such better exercise of power is the real purpose of Congress, and, finally, that the action of Congress does not conflict with any constitutional prohibition. (5) Congress has such sovereignty or "plenary power" to regulate interstate and foreign commerce; and in the exercise of this power it may accordingly erect, as in fact it has erected, corporations. (6) The validity of the erection of federal corporations being subject to no tests other than those above mentioned, and Congress being the proper judge of the degree of necessity for the erection, no special limitations, such as the existence of a strictly "political" connection between the government and the corporation erected, can be assumed as a necessary prerequisite to congressional action. It is submitted that these principles are contained in the decisions above examined.

It need then be shown merely that corporations carrying on interstate commerce have in fact a relation to the regulation of interstate commerce sufficiently close to indicate that such regulation may reasonably be regarded as the purpose of Congress in the erection of the corporations. Now if corporations may be erected, as has been affirmed in the case of railroad and bridge companies, in order to facilitate the carrying on of interstate commerce through the provision of more adequate instrumentalities thereof, why may they not be erected in order to facilitate it by providing a more efficient organization for those who carry it on—a result which incorporation indubitably accomplishes? If it be contended that there is an essential difference between bridge and railroad companies and trading companies, inasmuch as the former have a peculiarly public nature, and the latter are supposedly in less need of facilitation and control, it need only be replied that the degree of necessity is a matter for the consideration of Congress.

Although the facilitation of interstate and foreign commerce, through the provision of a superior form of organization for the use of those engaged therein, would of itself amply justify federal incorporation, there is another and, if possible, still clearer justification. The public utility of an efficient national control over persons engaged in interstate and foreign commerce is obvious. The confusion, not to say chaos, which results from state incorporation coupled with attempted federal control, has been amply demonstrated. And no remedy save national incorporation has been discovered, nor, as may be confidently affirmed, can be discovered, which will save, for the benefit of the people of the United States, the "big" corporation with its nation-wide—indeed world-wide—ramifications and at the same time subject it to an efficient governmental control. It is not necessary to discuss alternative plans; since, even admitting that any of them might prove satisfactory, Congress is recognized to possess the right to a choice of means.

Suggestions, heard in some quarters, that Congress abdicate its functions and responsibility as to interstate commerce, that the principles approved in regard to the liquor trade in the *Rahrer* case¹ be accepted as governing congressional action in other commercial matters and that a clear field be left to the state police power, are, aside from serious constitutional objections, chiefly interesting as illustrating the utopianism of their exponents. Few, if any, wilder ideas have ever been advanced in American politics than the notion that effective concerted action can be secured from the several states with regard to matters of this sort. Not until the American people forget the lessons of the Confederation, and of practically all their intervening history, will any such idea gain general acceptance.

From the judicial standpoint, then, it is necessary to show only that the corporate form of commercial organization is a means to the exercise of national authority over interstate and foreign commerce, and a means which bears such a relation to the subject-matter of the commerce clause that federal in-

¹ 140 U. S. 545; upholding the validity of an act of Congress providing that liquors shipped into a state should upon arrival therein become subject to the police power of the state.

corporation of trading companies may reasonably be regarded as springing from a congressional purpose of exercising control over such commerce. And this much is abundantly evident, whether attention be directed to the facilitation of that commerce through the provision of a more efficient organization thereof, or to the fact that such incorporation also provides an agency for more efficient federal control. Either of these considerations and, *a fortiori*, both taken together afford adequate constitutional justification for federal incorporation. From the constitutional point of view the utility or non-utility of any alternate schemes for the organization and control of this commerce have absolutely no bearing on the validity of federal incorporation.

The next question to be considered is that of the constitutionality of legislation conferring upon federal interstate commerce corporations the power to manufacture for the sake of passing the articles manufactured into interstate or foreign commerce. It is well at the outset to dispose of some very plausible but not, as it would seem, at all valid objections to the recognition of such power. These objections rest upon the well established principle that manufacturing is not *per se* commerce. It is submitted, however, that this principle does not render unconstitutional the conferring of the power to manufacture upon federal corporations engaged in interstate or foreign commerce.

The distinction between manufacturing and commerce is best developed in the case of *Kidd. v. Pearson*.¹ An Iowa statute, prohibiting the manufacture, except for specified uses, of liquor, was held not to be a violation of the federal power over interstate commerce, notwithstanding its necessary economic relation to such commerce. The court said:

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incident thereto constitute commerce, and the regula-

¹ 128 U. S. 1.

tion of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing.

Thus interpreted, commerce would embrace "every branch of human industry"; for, asks the court:

Is there one of them that does not contemplate more or less clearly, an interstate or foreign market? Does not the wheatgrower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago?¹

It is further pointed out that it would be impossible to regulate the details of all these productive enterprises by "uniform legislation generally applicable throughout the United States"; and it is asserted that the "local, detailed and incongruous legislation" required for successful regulation would, if enacted by Congress, be "about the widest possible departure from the declared object" of the commerce clause. Finally it is said that there would in any case remain the possibility that the producer contemplated an intrastate market; and so "interminable trouble" would be caused by attempting to draw a line between state and congressional regulation upon the basis of the "secret and changeable intentions of the producer in each and every act of production."²

The validity of the distinction as expressed by the court may readily be granted, as may also the correctness of the decision of the case at bar. What should be particularly noted, however, is the limited constitutional application of the distinction. As the above quotation shows, the decision rested not simply upon the distinction between manufacturing and commerce but upon the fact that there was no basis for determining whether liquors manufactured in the state were to pass in interstate and

¹ *Ibid.* p. 20.

² *Ibid.* p. 22.

foreign commerce. This consideration would serve by itself to distinguish *Kidd v. Pearson* from any case which might involve the validity of legislation conferring the power of manufacturing for the sake of passing the product into interstate and foreign commerce. In such a case the intent of the producer would be determined by the power granted. *Ex hypothesi*, no authority would be given to manufacture products to be used in intrastate commerce. If a state should choose to give this additional power to a federal corporation, that would be the affair of the state itself.

That a definite federal grant of the kind under discussion and an inquiry regarding the constitutionality of such a grant would involve considerations quite other than those which determined the decision in *Kidd v. Pearson* will become evident if we consider the question from another point of view. In the case of *Kidd v. Pearson* a contrary decision would have denied to the state a power to control manufacture incidental to intrastate commerce because of the alleged effect of the prohibition upon interstate commerce. This would have been unreasonable. It would have established, in effect, the right to manufacture, for the purpose of using in intrastate commerce the articles manufactured, without the corresponding obligation of subjection to police control. But, aside from the difficulty of determining the intention of the producer, it may reasonably be asserted that the fact that manufacturing is not *per se* commerce apparently gives to the state, in the absence of federal legislation based on the relation between manufacturing and commerce, a plenary police power over manufacturing, whatever may be the intent of the producer as to the disposition of his product.

The case of the *United States v. E. C. Knight Company*¹ adds nothing in principal to that of *Kidd v. Pearson*. In the *Knight* case the principles of the distinction between manufacturing and commerce are elaborated upon the same basis as in the case of *Kidd v. Pearson*, which is cited at some length, and the conclusion is reached that a monopoly of manufacture is not *per se* a monopoly of commerce. The chief distinguishing

¹ 156 U. S. 1.

feature in the Knight case is that the law under consideration was a federal law. But the application of the Knight case is very limited, since the decision rested, in large part at least, on the fact that the pleadings failed to show that the monopoly in manufacture had as its purpose or necessary result a monopoly of interstate commerce. It is accordingly not possible to say that, had the pleadings shown this, the monopoly of manufacturing would not have been held to work a restraint of trade in violation of the Sherman Act.

There is, indeed, an important series of more recent cases which support the position that, if a scheme of action, when taken as a whole, is predominantly directed toward interstate commerce, the component parts of the scheme fall under congressional control, and that manufacturing may be such a component part.

In the case of *Swift and Company v. United States*¹ the admissibility of an incidental federal control over intrastate commerce was at issue. The court treats the matter as follows:

Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote or merely probable. On the allegations of the bill, the latter commerce no less, perhaps even more, than commerce within a single state is an object of attack. . . . Moreover it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *U. S. v. E. C. Knight Co.*, 156 U. S. 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the states in the articles manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. . . . The two cases are near to each other . . . but the line between them is distinct.²

The case of *Montague v. Lowry*³ goes a step further than the Swift case; for the combination under consideration was a combination between dealers and manufacturers, and not between dealers alone. The court held that

¹ 196 U. S. 375.

² *Ibid.* p. 396.

³ 193 U. S. 38.

the whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the state of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.¹

The same doctrine is applied in *Loewe v. Lawler*²—the Danbury Hatters case—and in this case the right, under certain conditions, of direct federal control over manufactures appears to be affirmed. The court indicates the nature of the case by the following quotation from the allegations:

We repeat that the complaint averred that plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty states other than the state of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the state of Connecticut; that at the time the alleged combination was formed they were in the process of manufacturing a large number of hats for the purpose of filling engagements then actually made with consignees and wholesale dealers in states other than Connecticut; and that, if prevented from carrying on the work of manufacturing these hats, they would be unable to complete these engagements.³

It is further shown how a labor combination, the members of which resided "in all the places where the wholesale dealers in hats and their customers resided and did business," sought to compel plaintiffs to unionize their factory, as part of a purpose to force "all manufacturers of fur hats in the United States" to do the same. Upon plaintiffs' refusal, a boycott was declared against them and was extended to their customers and eventually to the customers of the latter. It was not confined to the state of Connecticut but covered as well the interstate trade of the plaintiffs. Among the means of coercion to be employed was the causing, by threats and coercion "and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them," both union and non-union. The design was "thereby

¹ 193 U. S. 46.

² 208 U. S. 274.

³ *Ibid.* p. 304.

[to] cripple the operations of the plaintiffs' factory and prevent the plaintiffs from filling a large number of orders then on hand from such wholesale dealers in states other than Connecticut." The court regarded these averments as indicative of the existence of a direct purpose of destroying plaintiffs' interstate trade, not merely of preventing them "from manufacturing articles then and there intended for transportation beyond the state," but also preventing "the vendees from reselling the hats which they had imported from Connecticut or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination."¹ The court accordingly held that,

although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of federal authority, still . . . the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other after physical transportation ended was immaterial.

The Knight case is distinguished upon the ground that there "the object and intention of the combination determined its legality."² This view of the Knight case, especially when coupled with the defectiveness of the pleadings therein, goes far to support the opinion expressed above regarding that case.

The Danbury Hatters case is worthy of more careful examination than can here be devoted to it. For the purposes of this article, it is sufficient to point out that the case shows conclusively that a necessary relation may exist between manufacturing and interstate trade, and that such a relation may form a legitimate basis for federal action with regard to manufacturing. To justify federal legislation conferring upon federal interstate-commerce corporations the power to manufacture articles to be passed into the channels of interstate trade, it is necessary only

¹ *Ibid.* p. 300.

² *Ibid.* p. 297.

to show that the bestowal of such a power will make them more efficient organs for the working-out of the national regulation of interstate commerce. The most strictly limited interpretation which it is possible to give to the principles governing the decision in this case will afford judicial precedent for the recognition of this degree of connection between manufacturing and commerce.

Special attention should be called to a few of the facts in this case. (1) The ultimate purpose of the labor combination related to conditions of manufacturing, not to the conditions under which interstate trade, in and of itself, was to be carried on. The decision therefore establishes the principle that any substantial relation between acts and purposes on the one hand and the carrying-on of interstate commerce on the other justifies federal control with regard to such acts and purposes, and that such a relation exists where such acts and purposes affect interstate commerce only by the results which necessarily attend the carrying-out of the purposes. (2) Since the decision is based upon the purpose and effect of the scheme as a whole, and since it is held to be immaterial that some of the acts alleged were done either before or after physical transportation, it must logically follow that, given the purpose of restraining interstate trade, even if the acts done for the sake of that end had related simply to the prevention of manufacture, with the necessary result, however, of preventing shipment, all the essential elements of the scheme would have been present and the decision must have been the same. (3) Finally, the existence of orders for goods to be transshipped in interstate commerce furnishes an answer, with regard at least to federal control over acts by private parties which would prevent manufacture of goods to be used in filling such orders, to the objection largely controlling in *Kidd v. Pearson* and the *Knight* case, *i. e.* the uncertain intent of the producer.

The conclusions reached from the foregoing examination of the leading cases dealing with the relationship between manufacturing and interstate trade may be recapitulated as follows: (1) Manufacturing is not *per se* commerce. (2) Manufacturing may, nevertheless, be controlled by the federal government

under the commerce power, in so far as in any given case of the exercise of such control a necessary relation between manufacturing and commerce can be shown to exist. (3) The variable and uncertain intent of the producer is a bar to federal control and a justification of state control, even though such state control may have an actual and important effect upon interstate trade. (4) Under some circumstances a necessary connection between manufacturing and interstate trade may remove this uncertainty as to the intent of the producer. Under such circumstances manufacturing, or any interference therewith, is recognized as being part of a scheme which, when taken as a whole, relates to interstate commerce and falls under the regulating authority of federal government.

If the foregoing analysis is correct, it is clear that there are no judicial precedents which can be invoked to deny to the federal government the right to confer, upon any corporations which it may erect and to which it may give the power to carry on an interstate trade, the further power to manufacture articles to be transshipped into such trade. The great bar to federal control over manufacturing—the uncertain intent of the producer as to the interstate or intrastate disposition of the articles manufactured—will clearly not exist where the power to manufacture is thus limited by the very terms in which it is bestowed. This being true, it remains only to show that the conferring of such a power to manufacture would have the effect of better fitting federal interstate-commerce corporations to fulfil the ends for which the federal government may create them. This can be done by showing the existence of a real relation between manufacturing and commerce. The Danbury Hatters case has already been considered and found to support the view that such a relation actually exists. Some further consideration will tend to put the argument beyond the possibility of reasonable question.

It should first be noted that, in order to justify the conferring of a given power upon federal corporations or licensees, the relation between manufacturing and interstate commerce need not be so close as it must be in order to justify a general federal control over the matter in question. For example,

the relation of ordinary banking operations to the purposes for which the federal government incorporates national banks justifies the conferring upon these banks of the power to carry on all such operations. But the federal government can not control these operations as carried on by state banks. In the case of powers conferred upon federal corporations, this distinction depends largely upon the existence or the elimination of uncertainty as to the necessity of the relation between the power conferred and the legitimate ends of the federal government. It is largely a matter of making the exercise of such powers part of a scheme over which, when it is taken as a whole, the government has indubitable authority.

It is evident that the connection between manufacturing and interstate commerce is a necessary relation in the sense that the conditions under which manufacturing is carried on profoundly affect interstate commerce. Consider, in the first place, the effects of the power of the states over "foreign" corporations. It is well settled that it is wholly within the discretion of a state to admit or exclude a corporation created by another state. Subject to the federal guaranty of the obligation of contracts and, it would seem, to the provisions of the fourteenth amendment, a state has also the power to exclude such corporations after they have been admitted. In the case of the *Hammond Packing Company v. Arkansas*,¹ it was held that an allegation as to the motive for the exclusion, even though such motive may arise from acts done by the corporation outside of the jurisdiction of the state, need not be considered by the court. The court said:

If the premise of the asserted proposition be that, even though the statute addressed itself exclusively to the doing of business within the state under the circumstances stated, it nevertheless exerted an extra-territorial power because it restrained the continuance of business within the state by a corporation which had done the designated acts outside the state, we think the proposition without merit. As the state possesses the plenary power to exclude a foreign corporation from doing business within its borders, it follows that, if the state exerted

¹ 212 U. S. 322.

such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to call the power into play. This being true, it follows that, as the power of the state to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the state, unless by the act of admission some contract right in favor of the corporation arose . . . the prohibition against continuing to do business in the state because of acts done beyond the state was none the less a valid exertion of power as to a subject within the jurisdiction of the state. . . . The power, and not the motive, is the test to be resorted to for the purpose of determining the constitutionality of the legislative action.¹

It is evident that a state may thus interfere very radically with the operations of companies not federally incorporated. It is also clear that federal incorporation without grant of the power to manufacture would still leave corporations largely at the mercy of the states. In order to carry on manufacturing, they would require state charters or state grants of privilege; and even though the state and federal corporations were absolutely separate in organization it is clear that the state power over corporations admitted or created by its authority could be used to superadd regulations which might, in terms or in effect, control the purely trading operations of the federal corporation. Federal control over manufacturing is essential to independent and efficient federal control over purely trading operations.

This, however, is but one illustration of the legal interdependence of manufacturing and commerce. The legal relation between these matters is inevitable because of the economic relation, which is simply that of means to end. The existence and application of this relation is a commonplace in the legislative history of every commercial power. Upon it is based the almost universal system of protective tariffs. The relation also appears in the fact that one of the most important considerations regarding the advisability of various forms of labor legislation is always the probable effect upon foreign commerce, and, in state legislation, upon interstate commerce, of the in-

¹ *Ibid.* p. 342.

creased cost of production which regularly follows every attempt to improve the position of the laborers. At a time when the United States is developing its export trade with unexampled rapidity, the necessity of subjecting the manufacture of the goods which are to pass in that trade to a federal—and exclusively federal—control is too obvious to require discussion. And the same necessity applies to the manufacture of goods which are to pass in interstate commerce. The whole business of manufacturing is carried on with a view to, and its success is dependent upon, the securing of a low production cost in order to compete successfully in the disposal of the goods produced. If legislative control over manufacturing carried on for the sake of interstate and foreign commerce be allowed to remain with the states, the development of these forms of commerce will be most seriously hampered. Not only will the development of our export trade be imperiled, but fair and equal disposition through the channels of interstate trade of articles manufactured in different states will be impossible. On the other hand, in proportion to the influence which the foregoing considerations, especially the necessity of a low production cost, exercise upon the minds of our state legislators, regulations, in the nature of labor and other legislation, which might control manufacturing in such a way as effectively to promote the public welfare, will be in a large measure defeated, because each state will be apprehensive that its manufacturers may be placed at a serious disadvantage in the disposition of the goods produced. Manufacturing and trading operations are so inextricably blended that the one can be effectively regulated only by the authority which controls the regulation of the other. If the interrelations between the two do not constitute a “necessary relation,” it is difficult to conceive in what a necessary relation would consist.

It may then be said that the power of Congress to confer upon federal interstate-commerce corporations the right to manufacture goods to be passed in interstate or foreign commerce amply meets Marshall’s test, as he developed it in connection with the granting to the National Bank of the power to do a private banking business. The grant of the power to manufacture is essential in order to make these corporations fit instru-

ments for the carrying out of federal purposes relative to the regulation of interstate commerce. The purpose of Congress in granting this power would be a public purpose and would have a reasonable relation to the control of interstate and foreign commerce.

Many of the arguments advanced against the recognition of the power which is here claimed to reside in the federal government are doubtless inspired by a feeling of apprehension, evoked by the remarkable expansion of federal authority which has already been occasioned by changing industrial conditions. But, as has been pointed out above and supported by quotations from the opinions of the Supreme Court, constitutional principles must, in order to preserve their real meaning, necessarily have different applications to various concrete situations. The principles governing the problem discussed in this paper have always been the same, and no situation has ever existed in which federal interstate-commerce corporations, with the powers relative to manufacturing outlined above, could not have been constitutionally created. That under present industrial conditions such corporations would in their operations occupy a very extensive portion of the commercial and industrial field can in no wise offer a ground of legitimate argument against their constitutionality.

Before closing this part of the discussion, it may be well to revert to a point already noticed in connection with Marshall's opinion in *Osborn v. The Bank*, *viz.* the possible contention that every federal corporation must be an "agent" of the government or have a strictly "political" connection therewith. It is hoped that the considerations previously advanced made it apparent that either these relations were not at all essential or else the words "agent" and "political" must be interpreted in so broad a sense as to mean simply "having utility for a public and properly national purpose." But upon the basis of the argument as developed in the later parts of this paper, it is believed that it can be safely asserted that, granting the existence of such limitations upon the federal power of incorporation, incorporation for the purposes and with the grant of the powers above contended for could still be justified.

If the argument be based upon the word "agency," and if agency be understood to mean the performance of a function which the government itself could constitutionally undertake, it is hard to see why the government itself could not constitutionally carry on interstate commerce and manufacture goods to be used in such commerce. If the government could do this, however undesirable such governmental action might be, it is evident that corporations erected for that purpose would necessarily be governmental agents, even in this restricted interpretation of the term. And since regulation involves a choice of means, the burden of proof is with those who would deny this power to the government.

Again, if the argument be based upon the word "political," and if a political connection be, for the purposes of argument, understood to be a connection relative to a peculiarly governmental function, where shall we draw the line which will include banking and transportation and exclude trading operations? In the present stage of industrial and commercial development, is it possible to assert that a corporation which should furnish a medium for efficient governmental control over matters the regulation of which is so essential to the general welfare would not have this peculiarly political connection with the government? These considerations are, however, introduced merely for the sake of argument. That federal incorporation is not at all subject to any such tests has, as it is hoped, been sufficiently established in the preceding discussion.

It will be impossible in the present paper to treat at all fully the powers which may be constitutionally conferred upon such federal corporations and the correlative exemptions from state control. The general principle is plain enough, and has already been developed in connection with the subject of manufacturing. Any power which will fit the corporation to perform more effectively the work for the sake of which it is created may properly be conferred, in the absence of any direct constitutional prohibition, and the exercise of such powers can not in any way be interfered with or controlled by a state. Furthermore, as an incident to the right of Congress to a choice of

means, congressional judgment, if at all reasonable, as to the necessity of any particular power will be conclusive upon the court. These principles, it will be recalled, are elaborated in Marshall's opinions in the United States Bank cases.¹

Exclusive jurisdiction over suits to which a federal corporation is a party may be vested in the federal courts. It was held in *Osborn v. The Bank*² that federal corporations may be authorized to sue in the federal courts, since every act of a federal corporation grows out of a law of the United States. The Pacific Removal cases³ held that it may be provided that a federal corporation shall be sued in the federal courts, and, accordingly, that such a corporation may—the privilege being deducible from its charter—cause any suit against it to be removed into the federal courts. It follows that the federal courts may be made the sole tribunals for the decision of cases relative to federal corporations, and the fact that various matters not dependent upon the construction of federal law may be involved is immaterial.

A few illustrations of the extent of the powers and exemptions from state control which may be granted to federal corporations may be useful. The case of *Easton v. Iowa*⁴ is particularly instructive. It was held in this case that a state statute designed to prevent fraud can not apply to a national bank. And it should be remembered that this power of legislation for the prevention of fraud is one of the most far-reaching of state powers. The following quotation shows very clearly the viewpoint of the court:

Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control their operations . . . ; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.⁵

These principles apply with equal force to the powers granted

¹ Cf. *supra*, pp. 65-72.

² 9 Wheaton, 738.

³ 115 U. S. 1.

⁴ 188 U. S. 220.

⁵ *Ibid.* p. 238.

to any federal corporation or bestowed upon any individual by the federal government in the exercise of its constitutional authority.

Citations regarding the exemption of federal corporations from state control might be multiplied indefinitely. Marshall sets forth the principle very clearly in the case of *Weston v. Charlestown*.¹ Two quotations from that opinion will reveal its force.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but not to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States. . . . The states have no power by taxation or otherwise to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.²

The same principles are set forth in *Davis v. Elmira Savings Bank*,³ where a New York statute regarding the distribution of the assets of insolvent banks conflicted with congressional legislation regarding national banks. The court said:

National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Cases regarding the acts of officers of the United States done in the performance of their duties are in point, since their exemption from state control rests upon the same principle.

¹ 2 Peters, 449.

² *Ibid.* p. 466. Marshall is quoting from his opinion in *McCulloch v. Maryland*.

³ 161 U. S. 275.

Among these cases may be cited *Tarble's case*,¹ *Tennessee v. Davis*,² *In re Neagle*³ and *Ex parte Siebold*.⁴ Although there may be a certain distinction between the acts of federal officers and federal corporations—a distinction which would apparently find application with regard to the granting of writs of *habeas corpus*—the principle of the supremacy of federal law is the same in both classes of cases.

That the federal government may determine private-legal relations with regard to matters within its jurisdiction is also illustrated by the case of *Lord v. Steamship Company*.⁵ This decision, based upon the commerce power, upholds a federal law limiting the liability of carriers by water. The carriage in question was upon the high seas but entirely between ports and places in the same state.⁶

The case of *Ohio v. Thomas*⁷ is particularly instructive by reason of the apparent unessentiality of the matter over which federal control was none the less affirmed. The governor of a soldiers home, located in Ohio and upon land subject to the jurisdiction of that state, had supplied oleomargarine to the inmates and had been arrested for violation of an Ohio law. The court found that he had acted under authority of federal law; it consequently upheld the action of the circuit court in granting a writ of *habeas corpus*. The particular interest of the case lies in the claim made in behalf of the state that the acts done by the governor were properly subject to state law, in that they were "not necessary for the government and management of the home for the purpose for which it was incorporated, or authorized by any act of the United States." But the court held that the act was done under authority of the United States and was "therefore legal, any act of the state to the contrary notwithstanding." It would appear, accordingly, that whatever is done in accordance with United States authority will, to an extremely wide extent, be accepted by the court as being necessary to the carrying-out of the purpose of federal incorporation. The giving-out of oleomargarine as a ration can hardly be regarded as a

¹ 13 Wallace, 397.

² 100 U. S. 257.

³ 135 U. S. 1.

⁴ 100 U. S. 371.

⁵ 102 U. S. 541.

⁶ Cf. also *Employers Liability cases*, 207 U. S. 463.

⁷ 173 U. S. 276.

matter of very pressing necessity. It must then follow that the inherent importance of any particular action is immaterial; that any and every detail of the management of a federal corporation may be regulated by the federal government, and this to the exclusion of state control.

It is therefore needless to go into details as to powers which may be conferred and as to correlative exemptions from state authority.¹ Aside from any direct constitutional prohibitions, the discretion of Congress is limited solely by the necessity of some reasonable relation between the powers conferred and the better fitting of the corporation for carrying out the public purposes for which it is established. Just as Congress, to recur to Hamilton's illustration, could not erect a corporation for superintending the police of Philadelphia, so it could not confer that power upon a corporation previously erected for a proper purpose. The reason for this is not that the power conferred must be such as would justify the erection of a corporation for the sake of that function taken by itself, but rather that the superintendence of the Philadelphia police is not a proper purpose of congressional action.

This limitation, however, must be rather narrowly construed. It has been shown above that things ordinarily outside federal jurisdiction may be included among the powers granted to federal corporations or conferred as part of a licensing system upon individuals. It has also been shown why and to what extent this is true: it is true in so far as such matters form constituent parts of a scheme which, taken as a whole, is subject to federal authority. Among the powers which may be conferred upon federal interstate-commerce corporations it is probably safe to include that of doing an intrastate business, to the extent to which such intrastate business forms a necessary part of the interstate business. This relation certainly exists in the case of local telegraph business.² It may also be well to note particularly that the

¹ An interesting statement of what the court conceives that Congress may do with propriety in the case of national banks is to be found in *Cook County National Bank v. United States*, 107 U. S. 445. But Congress has never in the organization of these banks occupied the full field belonging to it.

² *Cf. Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 37.

relations between employer and employee would be subject to exclusive federal jurisdiction.

It is not necessary to discuss in any detail the cases in which state laws have been held to apply to national banks, since such cases always rest either upon express permission of Congress or else upon failure of Congress to cover the subject-matter either directly or by implication. In *Bank v. Commonwealth*¹ there is to be found what is perhaps the strongest statement by the Supreme Court of the authority of the states. The decision rests in effect upon congressional permission; but the opinion contains statements which are somewhat ambiguous. It may be well to quote:

The agencies of the federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because these exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.²

The above quotation contains suggestive and valuable examples of matters which may be regulated by state laws in the absence of congressional action. The decision was hardly intended to go—and it certainly would not be a proper interpretation of the Constitution if it actually went—further than this. The very

¹ 9 Wallace, 353.

² *Ibid.* p. 362.

nature of the points referred to demonstrates this conclusively. For instance, it would be altogether absurd to contend that the utility of a national bank as a federal instrumentality might not be easily impaired if the right of the bank to collect its debts could not be constitutionally provided for and controlled by the federal government. Again, the comparison with federal officers is not completely in point, since a federal officer has a dual character, one official, one private. The bank, on the other hand, since it neither exists by the authority nor is introduced by the permission of the state, may, if Congress so determines, be subjected to federal control as to its every act, as exclusively as if it were not physically situated within the state.

The last question which remains to be discussed is that of the right of the federal government to restrict the conduct of interstate commerce under the corporate form of organization to corporations either of its own creation or else admitted by it to such commerce. It must be held that the federal government has this right. It is well settled that the power of the federal government over interstate commerce is plenary, and thus inclusive of the right to exclude from such commerce, provided always that the exclusion is not arbitrary. The matter was discussed at length in the *Lottery case*,¹ and it was expressly held that such a power of exclusion existed and was limited only by direct constitutional prohibitions or by the constitutional guaranties of private rights. The state power of excluding foreign corporations has been noticed above. To say nothing of the clause as to the impairment of the obligation of contracts, the guaranties of the fourteenth amendment limit the states as closely as those of the fifth amendment limit the federal government. Further argument does not seem to be required.

The further problem of the effect upon property rights of the exclusion from interstate commerce of corporations whose participation in such commerce has been tacitly recognized by Congress can not be considered within the limits of this paper.² It would be most unfortunate if Congress were to be recog-

¹ 188 U. S. 321.

² But *cf.* The *Commodities case*, *United States v. Delaware and Hudson Company*, 213 U. S. 366.

nized as having the power practically to confiscate property, and it is not believed that either Congress or a state has any such power in its dealings with corporations. Without such power, the congressional authority over new corporations and the congressional power of justifiable police control over corporations already participating in interstate commerce are amply sufficient to secure every end of a sane legislative policy.

It has already been shown that the power of granting licenses to individuals has the same extent as that of erecting corporations. It may be added that the power of excluding individual participation in interstate commerce is fundamentally the same as that of excluding corporations. There is, however, this important difference. A corporation which has not been directly or tacitly admitted to a participation in such commerce has absolutely no implied right to such admission. An individual always has this right, subject to a reasonable police control. This control must be in the interest of the public welfare and must have a reasonable relation to the good conduct of interstate commerce. Its general scope is the same as that of the control over corporations already admitted to interstate commerce. Its exact delimitation would require a discussion far too extended to be included in the present paper; but the general principle is sufficiently clear.

The conclusions of this paper may be summed up in a sentence: Congress has full constitutional power to create a system of interstate commerce under complete federal control, to include within that system the manufacture or other production of goods to be passed in such commerce, and to protect this system, in all its details, from any species of state interference. Thus baldly stated, these conclusions may appear to be somewhat radical. But it is hoped that they have been justified by the reasoning and precedents which have been advanced in their support. It is also believed that it can not be successfully disputed that such a system, so far from imperiling private rights, is absolutely necessary for their protection—a task to which the system of divided control over interstate commerce is palpably unequal.

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